STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

DENISHIO JOHNSON,

Plaintiff-Appellant.

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156057
Court of Appeals No. 330536
Lower Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant.

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156058
Court of Appeals No. 330537
Lower Court No. 14-002166-NO

DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF OPPOSING LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Elliot J. Gruszka (P77117)
Assistant City Attorney
City of Grand Rapids Department of Law
Counsel of Record for
Defendants-Appellees
300 Monroe Avenue, NW, Suite 620
Grand Rapids, MI 49503
(616) 456-3181

Dated: March 9, 2018

TABLE OF CONTENTS

Contents

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF APPELLATE JURISDICTION

Appellees renew their reliance on Appellants' original statement of appellate jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. For a custom to be facially unconstitutional, it must either cause a constitutional injury whenever it is applied or draw no distinction between legal and illegal applications. The City authorized use of the picture and print custom during field interrogations only when an officer determined that doing so would confirm or dispel his reasonable suspicion. Does this custom cause a constitutional injury whenever it is applied or draw no distinction between legal and illegal applications?

Defendants-Appellees answer:	No.
Plaintiffs-Appellants answer:	Yes.
Court of Appeals answers:	No.
Kent County Circuit Court answers:	No.

II. A facially constitutional custom can be the cause of a constitutional injury if, by adopting the custom, the City was deliberately indifferent to its citizens' constitutional rights by consciously disregarding actual or constructive knowledge that the custom was substantially certain to result in constitutional injuries. No court has ever held that photographing and fingerprinting a citizen during a field interrogation violates a constitutional right. Can the City be deliberately indifferent to a right no court has held exists?

Defendants-Appellees answer:	No.
Plaintiffs-Appellants answer:	Did not address this issue.
Court of Appeals answers:	Did not address this issue.
Kent County Circuit Court answers:	Did not address this issue.

III. To prevail on their § 1983 municipal liability claims, Appellants must show their alleged constitutional injuries were caused either by a facially unconstitutional custom or by the City's deliberate indifference to the constitutional right that was violated. The City's picture and print custom is neither facially unconstitutional, nor was it adopted with deliberate indifference to the rights Appellants allege were violated. Under the causation standards of *Monell*, did the picture and print custom cause Appellants' alleged constitutional injuries?

Defendants-Appellees answer:	No.
Plaintiffs-Appellants answer:	Yes.
Court of Appeals answers:	No.
Kent County Circuit Court answers:	No.

COUNTERSTATEMENT OF FACTS RELEVANT TO THE SUPPLEMENTAL BRIEFING

By the January 12, 2018 Order of this Court, supplemental briefing is limited to the discrete issue of "whether any alleged violation of the plaintiffs' constitutional rights were the result of a policy or custom instituted or executed by the defendant City of Grand Rapids." Therefore, the City relies on its Counterstatement of Facts and Proceedings provided in its answer opposing leave, (pp 4–13), and limits its discussion here solely to the scope and existence of a custom that could have violated Plaintiffs-Appellants' ("the Appellants") rights. Because "municipal liability under § 1983 may be predicated on *proof* of an official custom whether or not that custom is embodied in a formal policy," *Los Angeles v Lyons*, 461 US 95, 122; 103 S Ct 1660; 75 L Ed 2d 675 (1983) (emphasis added), the Court must look to the record below to determine what *proofs* of the scope and contours of the allegedly illegal custom Appellants have actually adduced.

The clearest statement in the record of what the custom is comes from the City's answers to the Appellants' requests to admit, where the City stated:

> Defendant City admits that officers taking photos and thumbprints of individuals is a custom or practice of the City of Grand Rapids and has been for decades … A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident.* [City's Response to Admissions, ¶ 11; J Appx, p 188a. (emphasis added).]

The emphasized portion is the custom that is relevant to the present case.

There is no specific written policy on conducting the picture and print procedure, but references to the practice appear in the Grand Rapids Police Department ("GRPD") Manual of Procedures ("MOP"). The Forensic Services Unit is tasked with "identify[ing] ... field

interrogation prints." (MOP, J Appx, p 150a.) Officers are directed to "obtain a photograph and fingerprint" of a person operating a motor vehicle with no license on his or her person. (*Id*. at 151a.) Officers may also "P&P" a subject whose license is suspended or otherwise invalid if the person is not arrested (*Id*. at 154a) When issuing appearance tickets for specific criminal offenses, officers are directed to take a picture and print of "all subjects without good identification." (*Id*. at 169a.) Sergeants are also trained on the picture and print procedure in the context of traffic stop and accident procedures. (GRPD Sgt Training Tasks, J Appx, p 186a.)

The MOP chapter on field interrogation procedures, (J Appx, pp 155a–166a), does not discuss the picture and print procedure. However, references to picture and print do appear in the GRPD Field Training Manual chapter on Field Interrogations, but only in an outline of subtopics, without explanation. (GRPD Field Training Manual, J Appx, pp 171a–172a.)

Slides from an officer training presentation show an example of a picture and print card (Officer Training Slides, J Appx, p 179a.) The presentation contains a sample police report narrative in which two subjects whom officers had reasonable suspicion were selling drugs, but for whom probable cause to arrest did not exist, were pictured and printed before being released. (*Id*. at 180a.)

In a training presentation related to gang activity, officers are directed to photograph "clothing, tattoos, jewelry … gang graffiti/artwork on clothing/shoes/hats/books/etc …" when engaged in a field interrogation with a suspected gang member. (*Id*. at 182a.) When officers have reasonable suspicion or probable cause to believe that a drug transaction has occurred based on their own surveillance, they are directed to stop both the suspected buyer

and seller. (*Id*. at 184a.) In each circumstance, after establishing rapport, the officer is directed to search the suspect, either with consent or based on the probable cause that was the basis for the stop. (*Id*.) If no contraband is found, the officer is directed to photograph and print the suspect. (*Id*.)

In his deposition for this case, Defendant VanderKooi gave an explanation of how and why the photo and print procedure is deployed in the context of field interrogations:

> Q: Why did you ask for a photograph of Mr. Harrison to be taken?
>
> A: [The first reason is f]or preservation of identity. We often get people we encounter in the City of Grand Rapids who don't tell us the truth about who they are and they are trying to evade responsibility for whatever misdeeds that may be involved, so they'll give you a wrong name, a false name, false date of birth.
>
> The second one would be it is, it's a collection of a what does that person look like at that point in time, that day and at that time, what was he wearing, what did he look like, could be what, you know, facial features, was he wearing glasses, what kind of facial hair did he have on his face. All that is preserved so that if later down the road we become aware that a crime was committed within near proximity within near period of time, that photograph would be used to say he matches the description of a suspect that we stopped and this crime happened nearby and this crime, you know, has a description similar to it, and therefore, the photograph would be like evidence to show what he looked like at that point in time.
>
> And, well, thirdly, of course, well, that's part of the field interrogations, so I think I covered it. [VanderKooi Dep, J Appx, pp 122a–123a.]

VanderKooi also described scope and contours of the picture and print custom in situations in which he made contact with a subject, but there was no probable cause to arrest:

- VanderKooi was responding with another officer to repeated complaints of drug dealing in an apartment complex parking lot at 11:30 p.m.; two subjects hid in the shadows upon VanderKooi's arrival; when VanderKooi and the other officer exited the car, the first subject ran and the officer pursued him; VanderKooi stopped the second subject; the first subject was arrested after a gun was found on the path where

he ran; the second subject was photographed for identification purposes and to preserve what he looked like to compare with descriptions of suspects of crimes reported at the apartment complex [*Id.* at 123a-124a];

- VanderKooi was responding to an in-progress breaking and entering (B&E) of an abandoned house known for use by juveniles for taking drugs inside; the subject was riding away on a bicycle from the scene; a witness confirmed the subject was not the one of the who broke and entered; however, flight from the location of the B&E gave VanderKooi reasonable suspicion the subject may have been a lookout or otherwise involved; a picture and print taken because the subject had no ID and to preserve evidence of subject's appearance in case other witnesses were located who would connect him to the crime [*Id.* at 124a–125a];
- a suspected get-away driver of shoplifting suspect was photographed and fingerprinted after giving a false ID card to investigating officers [*Id.* at 125a];
- during a traffic stop, both driver and passenger had no identification; the officer on-scene discovered and confiscated what he suspected were opioid pills in the car that neither occupant had a prescription to possess; VanderKooi authorized the officer to release the occupants after conducting a picture and print of each of them to preserve their identities while the pills were analyzed [*Id.*];
- VanderKooi was involved in a critical incident response to a gang related shooting that began as an altercation in front of a house; a standoff with police was ongoing, so police did not yet know who the shooter was; two suspects exited the house and neither had identification, so each had a picture and print taken to determine their identities and to preserve evidence of their appearance to compare to witness descriptions of who was involved in the altercation and who was the shooter [*Id.* at 126a];
- one day after a shooting where multiple witnesses described the assailants as three African-American males driving a gold car, an officer stopped a car matching the description that was occupied by three African-American males; there was not probable cause at that time to arrest the three individuals for the shooting, so the officer was directed by a detective to take a picture and print of the individuals for identification purposes and to aid in the ongoing shooting investigation [*Id.* at 127a];
- VanderKooi stopped an individual whose build and clothing were similar to a photograph of a credit card fraud suspect a detective had circulated; VanderKooi talked to the subject, obtained his name, and was given consent to take a picture, but no print, of the subject to forward to the detective investigating the credit card fraud [*Id.* at 128a.]

In the instant case, VanderKooi had developed reasonable suspicion Harrison was engaging, or had just engaged, in criminal activity based on his odd behavior in a park after VanderKooi observed Harrison and Pablo Aguilar exchange a large object at a time and location known to him to be active in home invasions and larcenies. (*Id.* at 109a, 110a.) VanderKooi asked only for a picture to be taken of Harrison, not a print. (*Id.* at 112a.) VanderKooi did not direct the officer who located Aguilar to take his photo because Aguilar had an ID. (*Id.*) VanderKooi requested a picture of Harrison because he did not have ID. (*Id.*) Harrison was not in custody and could have refused to have his photograph taken. (*Id.* at 117a, 123a.)

VanderKooi's reasonable suspicion was never dispelled during the encounter with Harrison because the object he saw being transferred was never located and because the time and location of the encounter was known to him to be a time during which an increased number of larcenies are committed by students leaving school. (*Id.* at 112a–113a, 115a.) VanderKooi continued to monitor incoming police reports for the next few days to see if property matching the description of the item he saw exchanged was reported stolen in close proximity in time and location to his field interrogation with Harrison. (*Id.* at 114a.)

Officer Newton testified that when he encountered Harrison's friend Pablo Aguilar, he conducted a consent search, verified Aguilar's identity by looking at his school identification, confirmed that his and Harrison's stories matched, checked for outstanding warrants, and then released him *without* taking a picture and print. When asked why he undertook this course of action, Newton affirmed that his policy and training instructed him how to conduct a field interrogation, but the choice of which tools to employ—such as a search or a

picture and print—were based on his training of what was appropriate and legal under the circumstances. (Newton Dep, J Appx, pp 48a–49a.)

Sergeant LaBrecque testified that he took the picture and print of Harrison at the direction of VanderKooi. (LaBrecque Dep, J Appx, p 76a.) LaBrecque further testified that he was unaware of any training manuals "relating to taking of pictures and prints in situations that didn't involve traffic accidents[.]" (*Id.* at 77a.)

In Johnson's case, according to Defendant Bargas, Johnson was seen looking into car windows in an area where there had been a string of thefts from vehicles. (Bargas Dep, J Appx, pp 132a–133a.) Johnson did not have identification on him and had been positively identified by a witness as the person looking into car windows. (*Id.*) Johnson had no identification on him, so Bargas took a picture and print of Johnson to preserve evidence of his identity and confirm or dispel his reasonable suspicion that Johnson had been involved in the prior vehicle break-ins. (*Id.* at 133a–134a.) Johnson's fingerprints could be used for comparison with latent prints on the cars into which he looked and with any latent prints from the prior break-ins. (*Id.* at 137a.) Even after Johnson's mother arrived to identify him, he remained a suspect in the prior vehicle break-ins because he was seen looking into cars and had exited the parking lot in the same direction as the previous suspects had fled. (*Id.* at 136a.)

At one point VanderKooi was asked directly "Which Grand Rapids Police Department policies authorize the taking of Mr. Harrison's picture and thumbprint?" to which he responded:

> There are field interrogation procedures. It addresses field, field interrogations and in there it states that you can take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody,

> and so, in there it outlines the guidelines for taking pictures and prints, as well as writing police reports. (VanderKooi Dep, J Appx, p 114a.)

It could appear at first blush that VanderKooi is stating that a picture and print is authorized during *any* contact or stop, regardless of the facts and circumstances of the specific case. This interpretation is foreclosed, however, by the fact that:

- Neither the Manual of Procedures (J Appx, pp 150a–169a) nor the Field Training Manual (J Appx, pp 170a–175a), discuss the circumstances under which a picture and print is authorized during a field interrogation;
- VanderKooi's other testimony shows that a picture and print is not taken automatically whenever there are "circumstances where you're engaged in a contact or stop or detained somebody." In each instance in the record describing the picture and print procedure, including those undertaken by VanderKooi, there were always articulable facts and circumstances of the stop that prompted and justified the use of the picture and print procedure.

The burden of proof of the existence of a custom and what that custom actually is remains squarely with Appellants. *Lyons*, 461 US at 122. The record is closed, and Appellants are not entitled to expand it either by creating a strawman[1] custom[2] without reference to any portion of the record whatsoever,[3] or by citing news articles covering this very case.[4] Because there is no formal, written policy governing "picture and print procedure during

---

[1] Appellants identify the custom at issue variously as: "…[the] custom authorizing the City's police officers to engage in particular conduct—in this case, to take P&Ps as part of *Terry* stops absent probable cause" (AT Supp Brf, p 2); "authorizing P&Ps during *Terry* stops." (*id*. at 4); "[The City] chose to adopt a policy authorizing P&Ps in field interrogations and *Terry* stops absent probable cause, and chose to encourage its officers to conduct P&Ps in those circumstances," (*id.*).

[2] Appellants' most succinct statement of what they would like the custom to be is "…the challenged policy is as described: taking P&Ps without a warrant or probable cause during field investigations that do not result in an arrest." (*id.* at 13 n 5.)

[3] "… the City purportedly changed its policy to no longer automatically take fingerprints and photos of everyone who lacked ID when detained as part of a *Terry* stop …" (*Id.* at 17.) There is no evidence whatever in the record to suggest, let alone prove, that the City had a custom of *automatically* taking fingerprints and photographs of all persons contacted during field interrogations who lacked ID.

[4] Appellants' so-called "Other Authorities" are listed on page iii of their supplemental brief and cited at pages 2, 16, and 17. It should go without saying that media coverage of this case is not evidence.

field interrogations," Appellants and this Court may only rely on the evidence actually produced at trial to determine what actually constituted the custom or practice Appellants allege caused their constitutional injuries. The foregoing discussion is a summary of all the evidence that was placed in the record of what the custom actually is and how it has been applied in this case and in others.

Taking the whole of the evidence presented above, the contours and scope of the custom of utilizing the picture and print procedure during field interrogations can be fairly summarized as follows (hereinafter the following is referred to as "the Field Interrogation P&P Custom"):

> An officer is authorized to take a picture and print of a subject during a field interrogation if:
>
> (1) there is reasonable suspicion, based on specific, articulable facts, that the subject may be committing a crime or a crime has just occurred, but there is not probable cause to arrest the subject; AND
>
> (2) the subject lacks identification; and/or a record of the subject's physical appearance at the time of the field interrogation is likely to confirm or dispel the officer's reasonable suspicion he or she was involved in the suspected crime; AND/OR
>
> (3) the subject's fingerprints are likely to confirm or dispel the officer's reasonable suspicion that the subject was involved in the suspected crime in the course of further investigation; UNLESS
>
> (4) the subject refuses to consent to the picture and print being taken.

For the reasons that follow, even if Appellants' constitutional rights were violated when their pictures and prints were taken as a part of this custom, under *Monell* and its progeny, the City cannot be liable because the custom does not authorize unconstitutional behavior on the part of City police officers.

SUMMARY OF THE ARGUMENT

Municipalities are only liable under 42 USC 1983 for constitutional torts committed by their employees when those employees are acting pursuant to an official policy or custom. For liability to attach, the custom must be the "moving force" behind the violation. In other words, the act of the employee must fairly represent the conduct of the municipality itself.

A plaintiff can prove a municipal custom was the moving force behind his constitutional violation in one of two ways: by showing that the municipality adopted a facially unconstitutional custom, or by showing that the municipality adopted a facially constitutional custom with deliberate indifference to the substantial certainty that implementation of the custom would cause constitutional injuries to its citizens.

A custom is facially unconstitutional if it causes a constitutional injury whenever it is applied or if it fails to take into account the totality of the circumstances in which it will be applied, such that it makes no differentiation between legal and illegal applications. The Field Interrogation P&P Custom is not facially unconstitutional because it considers the totality of the circumstances before it is applied.

A municipality can be deliberately indifferent only to clearly established rights. A right of privacy in one's face or fingerprints is not a clearly established right. Therefore, the City cannot have adopted the Field Interrogation P&P Custom with deliberate indifference to such a right.

For these reasons, even if Appellants' constitutional rights were violated when the City's police officers took their pictures and prints, the Field Interrogation P&P Custom was not the moving force behind the injuries.

ARGUMENT

I. Municipalities are liable for constitutional torts committed by their employees only when the conduct can fairly be said to be the conduct of the municipality itself.

These cases involve alleged violations of Appellants' federal constitutional rights.[5] As this Court has recognized "state courts are bound by the decisions of the United States Supreme Court construing federal law." *Abela v Gen Motors Co*, 469 Mich 603, 606; 677 NW2d 325 (2004), citing *Chesapeake & O R Co v Martin*, 283 US 209, 220–221; 51 S Ct 453; 75 L Ed 983 (1931). There is, however "no similar obligation with respect to decisions of lower federal courts." *Abela*, 469 Mich at 606, citing *Winger v Grand Trunk W R Co*, 210 Mich 100, 117; 177 NW 273 (1920). Nevertheless when construing federal law, including federal constitutional claims, lower federal court decisions may be persuasive, but are not binding. *Abela*, 469 Mich at 607.

The law of municipal liability for constitutional torts finds its origin in *Monell v Department of Social Services of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). There, the United States Supreme Court held that municipalities "can be sued directly under § 1983 … where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. Further, a municipality may be liable for constitutional violations resulting from the implementation of a "governmental 'custom'

[5] Appellants' Application for Leave to Appeal and Supplemental Brief both focus solely on alleged Fourth Amendment violations. By not arguing or even addressing the Fifth Amendment issues they pleaded in the trial court, Appellants are either abandoning or waiving any claim that a custom of the City caused a Fifth Amendment injury, *see Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008); *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), and thus the City focuses its brief entirely on whether a custom of the City caused a Fourth Amendment injury.

even though such a custom has not received formal approval through the body's official decision-making channels." *Id*. at 691. A "custom" is a persistent or widespread practice that "[a]lthough not authorized by written law" is "so permanent and well settled" as to have the force of law. *Id.*; *Bd of Co Comm'rs of Bryan Co, Okl v Brown*, 520 US 397, 403; 117 S Ct 1382; 137 L Ed 2d 626 (1997).

A. A municipality is liable for constitutional torts only when an official custom or policy is the moving force behind the constitutional injury.

Monell did not, however, impose a *respondeat superior* theory of liability on municipalities. *Monell*, 436 US at 691; *Pembaur v Cincinnati*, 475 US 469, 478–479; 106 S Ct 1292; 89 L Ed 2d 452 (1986); *Los Angeles Co v Humphries*, 562 US 29, 35; 131 S Ct 447; 178 L Ed 2d 460 (2010); *Connick v Thompson*, 563 US 51, 60; 131 S Ct 1350; 179 L Ed 2d 417 (2011). The mere fact that a city employs a tortfeasor will not impose liability on the city for the employee's unconstitutional acts. *Monell*, 436 US at 691; *Bryan Co*, 520 US at 403. Rather, the execution or implementation of a governmental policy must *cause* the employee to violate the plaintiff's constitutional rights; that is, the policy must be the "moving force" behind the violation. *Monell*, 436 US at 692, 694; *Jackson v Detroit*, 449 Mich 420, 433; 537 NW2d 151 (1995). A plaintiff must prove an "affirmative" or "direct causal link" between a custom it has proved exists and the alleged constitutional violation. *Jackson*, 449 Mich at 433; *Oklahoma City v Tuttle*, 471 US 808, 823; 105 S Ct 2427; 85 L Ed 2d 791 (1985) (plurality opinion of Rehnquist, J.); *Canton v Harris*, 489 US 378, 385; 109 S Ct 1197; 103 L Ed 2d 412 (1989).

In other words, liability for constitutional violations is limited to "acts that are, properly speaking, acts 'of the municipality'—acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 US at 480; *Connick*, 563 US at 61. Not "all harm-causing municipal

policies are actionable under § 1983" nor are "all such policies unconstitutional." *Collins v Harker Hts*, 503 US 115, 123; 112 S Ct 1061; 117 L Ed 2d 261 (1992). Rather a city is only liable "when it can be fairly said that the city itself is the wrongdoer." *Id*. at 122.

B. A municipality can be liable under *Monell* only if it has adopted a facially unconstitutional custom or if it is on notice that a facially constitutional custom has been consistently implemented in a manner that causes constitutional violations.

The United States Supreme Court has held that a plaintiff may demonstrate a custom or policy caused his constitutional injury by proving either: (1) the existence of a facially unconstitutional custom or policy, *Monell*, 436 US at 690–691; (2) that an official with final decision-making authority ordered or ratified the conduct, *Pembaur*, 475 US at 480–481; (3) the existence of a policy or custom of inadequate training or supervision, *Canton*, 489 US at 387–388; or (4) the existence of a custom of tolerance or acquiescence of constitutional violations. *Bryan Co*, 520 US at 407–408.

More broadly, however, theories of § 1983 municipal liability may be subdivided into just two categories. Municipalities may be liable for injuries caused by: (1) customs that are "facially unconstitutional as written or articulated;" or (2) customs that are "facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers." *Gregory v Louisville*, 444 F3d 725, 752 (CA 6, 2006), citing *Monell*, 436 US at 692–694; *see also Bryan Co*, 520 US at 404–407.

II. The picture and print custom is not the cause-in-fact of—much less the "moving force" behind—Appellants' alleged constitutional injuries.

There exists no reasonable expectation of privacy under the Fourth Amendment in the characteristics of one's face, *United States v Dionisio*, 410 US 1, 14; 93 S Ct 764; 35 L Ed 2d 67 (1973), and thus taking someone's photograph, even by the police, is not a search under

the Fourth Amendment. *See Maryland v King*, 569 US 435, 476–477; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (Scalia, J., dissenting), citing *Florida v Jardines*, 569 US 1, 5; 133 S Ct 1409; 185 L Ed 2d 495 (2013). Indeed, the United States Supreme Court has "never held that merely taking a person's photograph invades any recognized 'expectation of privacy[.]'" *King*, 569 US at 477, citing *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). Appellants evidently agree with this contention, as their Statement of Questions Presented in their application only claim that the taking of their fingerprints violates the Fourth Amendment, and they make no further mention or argument with respect to their photographs.

This claim is foreclosed by the United States Supreme Court's recognition that fingerprints are not protected by the Fourth Amendment, *Dionisio*, 410 US at 39 (Marshall, J., dissenting), although investigatory stops for the purpose of obtaining fingerprints are subject to that Amendment. *Id.*,[6] citing *Davis v Mississippi*, 394 US 721, 727–728; 89 S Ct 1394; 22 L Ed 2d 676 (1969). Justice Marshall dissented in *Dionisio* based solely on the Court's conclusions with respect to the Fifth Amendment issues, and he explicitly stated "I consider the Fourth Amendment to require affirmance of the decisions below in these cases[.]" *Id.* at 31.

Moreover, the Michigan Court of Appeals has held—in cases neither this Court nor a subsequent panel of the Court of Appeals has ever overruled—that no reasonable expectation of privacy under the Fourth Amendment exists with respect to one's fingerprints. *Nuriel v YWCA of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1991), *lv den* 439 Mich

[6] The City notes that on page 29 of its answer opposing leave, it inadvertently misattributed this citation to the majority opinion of *Dionisio* and not the dissent.

893; 478 NW2d 191 (Mem); *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989), citing *Dionisio*, 410 US at 14–15.

As discussed more fully in the City's answer opposing leave to appeal, (pp 27–30), the United States Supreme Court has never held that fingerprinting is a search under the Fourth Amendment. The Court has concluded, without deciding, that its precedents support the view that the Fourth Amendment permits "*seizures* for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Hayes v Florida*, 470 US 811, 817; 105 S Ct 1643; 84 L Ed 2d 705 (1985) (emphasis added).

In all of the United States Supreme Court cases discussing whether detentions for the purposes of taking fingerprints absent probable cause is permissible under the Fourth Amendment, the focus of the analysis is always on the legality of the detention, not the taking of the fingerprints themselves. *See Davis*, 394 US at 725–728; *Dionisio*, 410 US at 11 ("For in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints."); *Hayes*, 470 US at 815–816. There is simply no authority for the proposition that fingerprinting is in and of itself a Fourth Amendment search. Therefore, to the extent there is a constitutional evil in taking fingerprints absent probable cause to arrest, the evil is in the detention, not in the fingerprinting.

Appellants have expressly abandoned any argument to this Court that the *initial police contacts* in these cases were themselves illegal.[7] They neither argued, nor presented any evidence, that the initial police contacts in these cases were motivated by a desire to obtain Appellants' photographs and fingerprints. Neither does their formulation of the City's "policy" or custom include an element of *initiating* investigatory stops for the very *purpose* of obtaining fingerprints. Instead, they define the "policy" or custom as taking pictures and prints during *Terry* stops.

The evidence shows that the decisions to take pictures and prints of Appellants were made during the course of the stops, not as the basis for the stops. Moreover the evidence of what the Field Interrogation P&P Custom actually is demonstrates that actual application of the Custom is on all fours with the procedure the *Hayes* Court endorsed as permissible under the Fourth Amendment.

Therefore, even if Appellants' constitutional rights were violated in these cases the injury, if any, would be an illegal detention, *not* the taking of a picture and print. Therefore, because the Field Interrogation P&P Custom authorizes an officer to take a picture and print:

(1) only *after* the officer has initiated an investigative stop based on reasonable suspicion; and
(2) only if taking the picture and print will confirm or dispel the officer's reasonable suspicion the subject is involved in a crime

the Custom could not have been the cause-in-fact, let alone the "moving force" behind the only possible constitutional violations in this case. The authorization to take a picture and print under the Custom is only operative *after* an investigatory stop has been made. Neither

[7] App for Leave, p 26 n 16.

the laws of this State, nor of these United States, nor of physics permit a cause to occur after an effect.

Because the only possible constitutional injury took place prior to the application of the picture and print custom, the custom cannot be the moving force behind the constitutional injury and there is no § 1983 municipal liability. However, even if this Court were to conclude that taking a picture and print *during* the course of an investigative stop to confirm or dispel an officer's reasonable suspicion violates the Fourth Amendment —and that Appellants' Fourth Amendment rights were so violated—for the reasons that follow, the Field Interrogation P&P Custom was not the moving force behind the alleged constitutional injuries.

III. The picture and print custom is not facially unconstitutional because it neither violates the Constitution in every application nor fails to differentiate between constitutional and unconstitutional applications.

Where a plaintiff seeks to impose § 1983 municipal liability, he must do more than "identify conduct properly attributable to the municipality," he must "also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Bryan Co*, 520 US at 404 (emphasis in original). The City may freely concede that in the absence of the Field Interrogation P&P Custom, Appellants would not have had their pictures or prints taken during their respective investigatory stops. But for the reasons that follow, even if having their pictures and prints taken during a lawful stop somehow violated their constitutional rights, the Custom itself was *not* the moving force behind those violations.

In these cases, Appellants have explicitly limited the issue to whether the Field Interrogation P&P Custom is the moving force of their injuries because the custom is facially unconstitutional.[8] Proceeding under this theory of liability, "The city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipal policy." *St Louis v Praprotnik*, 485 US 112, 128; 108 S Ct 915; 99 L Ed 2d 107 (1988) (plurality opinion of O'Connor, J.).

The actual proof in this case demonstrates the Field Interrogation P&P Custom is more nuanced than Appellants would lead this Court to believe. Appellants urge the Court to construe the custom as the City's authorization of its police officers "to take fingerprints and photographs during *Terry* stops where there is no warrant and no probable cause for arrest." (AT Supp Brf, p 13.) Elsewhere, Appellants condense their "policy" statement even further to "an official policy of allowing P&Ps during *Terry* stops" without any further qualification on the circumstances in which the "policy will be applied." (*See Id.* at 15, 16, 17, 18, 19, 20, 25.) Appellants boldly imply, without any record citation, that the "policy" provided that pictures and prints were to be taken "automatically" without regard to any other facts or circumstances during *Terry* stops in which the subject lacked identification. (*Id.* at 17.)

Appellants' various statements of the alleged "policy" ignore, however, the actual testimony and documentation entered into the record that show that the actual custom was to authorize officers to take pictures and prints of subjects during field interrogations only when: (1) there was reasonable suspicion, based on specific, articulable facts, that the subject

[8] "Here, as set forth later, Appellants proceed under the first and fourth ways of showing 'policy or custom,' as the record establishes either an official policy or, at a minimum, a widespread custom or practice." (AT Supp Brf, p 11.) In listing four avenues of § 1983 municipal liability, Appellants mistakenly separate the first avenue of "policy, custom, or practice" into two avenues—"official policy" and "widespread custom or practice"—and omit the avenue of a custom of tolerance or acquiescence of unconstitutional acts.

may have been committing a crime or a crime has just occurred, but there was not probable cause to arrest the subject; **and** (2) the subject lacked identification; and/or a record of the subject's physical appearance at the time of the field interrogation was likely to confirm or dispel the officer's reasonable suspicion he or she was involved in the suspected crime; **and/or** (3) the subject's fingerprints were likely to confirm or dispel the officer's reasonable suspicion that the subject was involved in the suspected crime in the course of further investigation; **unless** (4) the subject refused to consent to the picture and print to being taken.[9]

For the reasons that follow, the Field Interrogation P&P Custom is not facially unconstitutional and therefore cannot as a matter of law be the moving force behind Appellants' alleged constitutional injuries. At the outset, the City wishes to explicitly disclaim its earlier argument that in order for a policy or custom to be facially unconstitutional it must cause a constitutional injury whenever it is applied. (Answer Opposing Leave, pp 17–18.) Rather, a custom is facially unconstitutional if it either causes a constitutional injury whenever it is applied or makes no distinction between constitutional and unconstitutional applications of the custom by failing to consider the totality of the circumstances.

A. A custom is facially unconstitutional if it causes a constitutional injury whenever it is applied.

The most straightforward type of § 1983 municipal liability analysis occurs when a city has adopted a policy or custom that causes a constitutional injury each and every time it is applied. *See Tuttle*, 471 US at 823–824; *Praprotnik*, 485 US at 128. Once such a "policy is es-

[9] *See* pp 1–8 of this Brief, *supra*, for all record citations demonstrating that this statement of the custom is supported by the evidence.

tablished, 'it requires only one application … to satisfy fully *Monell*'s requirement that a municipal corporation be held liable … for constitutional violations resulting from the municipality's official policy.'" *Pembaur*, 475 US at 478 n 6, quoting *Tuttle*, 471 US at 822.

The policy at issue in *Monell* itself is an exemplar of one which affects a constitutional injury each and every time it was applied. In that case, the plaintiffs were "female employees of the Department of Social Services and of the Board of Education of the city of New York." *Monell*, 436 US at 660. The Board and the Department had "as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." *Id*. at 661. Having concluded that such forced, unpaid leaves violated the female plaintiffs' constitutional rights, the Court held that the case "unquestionably involve[d] official policy as the moving force of the constitutional violation" and therefore concluded that the municipality was liable for the constitutional violations under § 1983. *Id*. at 694

In *Garner v Memphis Police Department*, 8 F3d 358 (CA 6, 1993), the defendants had adopted a deadly force policy, in accordance with a state statute governing deadly force, that authorized the use of deadly force to apprehend non-dangerous, fleeing burglary suspects. *Id*. at 364. Evidence in the record showed that the adoption of the policy was "a deliberate choice from among various alternatives"—and not, as the defendants argued, blind obedience to a state statute—because the defendants chose *not* to authorize the use of deadly force against fleeing felons such as embezzlers and frauds even though the state statute permitted the use of such force. *Id*.

The Sixth Circuit therefore concluded that the use of force policy was the moving force behind the constitutional injury: the excessive force that killed the plaintiff's unarmed son

who fled from the scene of a burglary after being ordered to stop. *Id*. The court reasoned that the department had trained its officers that it was proper to shoot a fleeing burglary suspect in order to prevent escape; that an officer so-trained had shot the plaintiff's son acting under that policy; and that therefore "there is a sufficient link between defendant's deadly force policy and [the officer's] actions to establish that the policy was the moving force behind the constitutional violation. *Id*. at 365.

In both of these cases, the policy adopted by the municipality caused a constitutional injury each time it was applied. It did not matter, for the purposes of the courts' analyses, that individual supervisors in the case of *Monell* or individual officers in the case of *Garner* may have retained discretion to apply the policy differently. The officer in *Garner* in particular was free to refrain from using deadly force to stop the fleeing burglar. However, because the City *authorized* the use of deadly force in that situation and because the use of deadly force in those circumstances is *always* unconstitutional, the policy itself caused the constitutional injury. Similarly, the maternity leave policy at issue in *Monell* would violate a pregnant employee's rights each time it was applied. The Field Interrogation P&P Custom does not cause a constitutional injury each time it is applied.

B. The picture and print custom does not violate the Constitution every time it is applied because the record shows circumstances exist in which it is a reasonable means to confirm or dispel an officer's reasonable suspicion.

Regardless of whether Appellants' constitutional rights were violated when their fingerprints were taken, there can be little doubt that circumstances exist in which taking a fingerprint during the course of a *Terry* stop to confirm a subject's identity or to confirm or dispel reasonable suspicion of his connection to a crime comports with the Fourth Amendment.

As discussed in the City's answer opposing leave to appeal, (pp 30–33), the act of a police officer confirming a subject's identity during an investigatory stop is "a routine and accepted part of many *Terry* stops." *Hiibel v Sixth Judicial Dist Court of Nev*, *Humboldt Co*, 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004). Indeed the United States Supreme Court has held police officers have the "ability to stop" a suspect and to "check identification in the absence of probable cause." *United States v Hensley*, 469 US 221, 229; 105 S Ct 675; 83 L Ed 2d 604 (1985). In the absence of identification to confirm a subject's identity, officers must "diligently pursue means of investigation that [are] likely to confirm or dispel their suspicions quickly." *United States v Sharpe*, 470 US 675, 686; 105 S Ct 1568; 84 L Ed 2d 605 (1985).

The United States Supreme Court has recognized that during the course of a *Terry* stop, officers are authorized to confirm a subject's identity through reasonable means—including checking ID—and to confirm or dispel their reasonable suspicions about the subject's involvement in crime. The Court has further endorsed fingerprinting as a reasonable means of confirming or dispelling reasonable suspicion in the absence of probable cause during the course of a *legal* stop. *Hayes*, 470 US at 817. Therefore, the Field Investigation P&P Custom, as outlined above and supported by the evidence in the record, does not—as did the policies and customs in *Monell* and *Garner*— violate an individual's Fourth Amendment rights whenever it is applied because it is a reasonable means of confirming a subject's identity and confirming or dispelling reasonable suspicion of a subject's involvement in a crime.

C. A custom is facially unconstitutional even if the custom can be applied constitutionally, but makes no distinction between constitutional and unconstitutional applications by failing to consider the totality of the facts and circumstances.

A municipal policy or custom can also be facially unconstitutional if, even though there are instances in which application of the custom will not work constitutional harm, the policy or custom neither makes a distinction between legal and illegal applications nor offers guidance to municipal employees on the difference. While neither the United States Supreme Court nor this Court have ever addressed such a case, several such cases have been decided by the United States Court of Appeals for the Sixth Circuit.

In *O'Brien v Grand Rapids*, 23 F3d 990 (CA 6, 1994), the plaintiff was permanently injured after being shot by the police after a nine-hour standoff. *Id*. at 994. The plaintiff, an allegedly mentally unstable individual, had initiated the standoff, retreating into his house holding a rifle, after the police came to seize his pickup truck to satisfy a civil judgment. *Id*. at 993. After nearly six hours—and without securing a search warrant—police officers began breaking windows of the house to attempt to see where the plaintiff was located. *Id*. at 994. After police broke one of the windows, and attempted to look inside, the plaintiff fired 10 shots at them. *Id*. The Chief of Police, who was on the scene, issued a shoot-to-kill order. *Id*. A few hours later an officer shot the plaintiff when his silhouette appeared in a window. *Id*.

Because the plaintiff was a barricaded suspect within his home, the police had classified the standoff as a "critical incident" per departmental policy. *Id*. at 1003. Prior to the incident, the City had employed a nationally recognized expert to overhaul its "critical incident" response plan. *Id*. at 1002. According to this training, a search warrant was never required during a critical incident, no matter how long the incident lasted. *Id*. As a result, it had become the police department's "routine practice during the course of critical incidents

to not acquire a warrant." *Id*. at 1003. In its brief analysis, the Sixth Circuit reasoned that the routine practice of not acquiring a warrant met *Monell*'s policy or custom requirement, that the plaintiff had certainly suffered a constitutional injury when the police entered his house without a warrant and shot him, and that there was no serious argument that the failure to get a warrant was the result of anything other than the City's policy or custom. *Id*. at 1005.

In *Gregory v Louisville*, 444 F3d 725 (CA 6, 2006), a former inmate, who was later exonerated, was denied due process of law when he was misidentified by a witness as a result of a one-on-one show-up. *Id*. at 754–755. There was sufficient proof that the city had a custom of using one-on-one show-ups in lieu of line-ups in non-exigent circumstances. *Id*. at 757. The issue before the court was whether the city's show up custom was the cause of his constitutional injury.

The court reasoned that although one-on-one show-ups are inherently suggestive, the United States Supreme Court has refused to hold them per se unconstitutional. *Id*. at 755. Rather, courts are to look to the totality of the circumstances to determine if the identification made at the one-on-one show-up is otherwise reliable, considering several factors. *Id*. Discussing a host of weaknesses and ways in which a one-on-one show-up can violate a suspect's constitutional rights, the court concluded: "The Supreme Court's teaching makes it clear that a failure to consider the totality of the circumstances, and the indiscriminate use of one-on-one show-ups, would have the obvious consequences of constitutional violations." *Id*.

The court further reasoned by analogy that a custom of using one-on-one show-ups without considering the totality of the circumstances would be "akin to conducting a search

or seizure without an assessment of probable cause." *Id*. at 756. Even though circumstances may exist where a show-up is justified—just as circumstances exist where a warrantless search is justified—a custom of failing to consider the totality of the circumstances will result in constitutional violations. *Id*. The court held "that a municipal practice of bypassing consideration of the circumstances in which the exercise of a city power is constitutional or not can lead to [§ 1983] municipal liability." *Id*. The court concluded that the plaintiff had adduced sufficient evidence that a jury could conclude that the city had adopted a custom of conducting one-on-one show-ups without consideration of the circumstances, and if the jury made this factual determination, the custom would be the moving force behind the plaintiff's constitutional injury. *Id*. at 757.

Finally, in *Kostrzewa v City of Troy*, 247 F3d 633 (CA 6, 2001), the defendant city had a "policy requiring officers to handcuff detainees during transport, no matter the circumstances and even if injury was substantially likely to result." *Id*. at 644. During his transport subsequent to arrest, the plaintiff complained to the officers that his cuffs were too tight and too small for his wrists, even on the loosest setting. *Id*. at 645. The officers dismissed his complaints, explaining that departmental policy required them to handcuff all detainees. *Id*.

The court noted that under *Graham v Connor*, 490 US 386, 396; 109 S Ct 1865; 104 L Ed 2d 443 (1989), some degree of physical coercion is reasonable when making an arrest. *Kostrzewa*, 247 F3d at 645. Nevertheless, the court reasoned that under *Graham*, the facts of each case must be evaluated in order to determine if a particular application of force is reasonable. *Id*. The court concluded, therefore, that there was sufficient evidence that the city had an unconstitutional policy of applying handcuffs to all detainees regardless of the facts

and circumstances of an individual case, and therefore a jury could conclude the policy was the moving force behind the excessive force the plaintiff suffered. *Id*.

In all these cases, application of the policies and customs in question was not unconstitutional in every instance. There are well-recognized exceptions to the warrant requirement, such that a search may be made in exigent circumstances. Surely some of the critical incidents the police responded to under the policy at issue in *O'Brien* met these criteria, even if the facts in *O'Brien* did not. Similarly, the court in *Gregory* noted that in limited, exigent circumstances, a one-on-one show-up does not violate the constitution, even if those situational were very rare. Even in *Kostrzewa*, where in the vast majority of cases it is reasonable to apply handcuffs to a detainee, there was a small minority of cases in which handcuffing was unreasonable because it was so likely to cause an injury.

The common analytical thread, that should persuade this Court, is that in each case the policy or custom was applied without consideration of the totality of the circumstances. Thus a policy or custom that has *some* constitutional applications may be facially *unconstitutional* if the custom fails to differentiate between lawful and unlawful applications—that is, if the custom does not take into account the totality of the circumstances.

D. The picture and print custom differentiates between constitutional and unconstitutional applications because it incorporates Fourth Amendment principles of reasonableness under the totality of the circumstances.

Appellants argue that "even assuming, theoretically, that not *every* P&P done during a *Terry* stop is unconstitutional, all that means is that the City's policy authorizes both constitutional and unconstitutional conduct." (AT Supp Brf, p 25.) As argued above, however, in order to show that a custom authorizing both constitutional and unconstitutional conduct is the moving force behind a constitutional deprivation, Appellants must demonstrate that the

Custom fails to take into account the totality of the circumstances. This—on the record before the Court—they cannot do.

Appellants have produced no evidence that the City has a custom of automatically taking pictures and prints in each and every *Terry* stop where the subject does not have identification and there is no probable cause to arrest. The City's admission of what constitutes the custom at issue (J Appx, p 188a), on which Appellants rely, at least for the purposes of argument, (*see* App for Leave, p 9; AT Supp Brf, p 5), explicitly states that pictures and prints will be taken during a stop only "if appropriate, based on the facts and circumstances of that incident." (J Appx, p 188a.) At no stage of this litigation have Appellants challenged the veracity of this admission, nor offered any argument or proof that consideration of the "facts and circumstances of [the] incident" are not taken into consideration when an officer takes a picture and print in the course of a citizen contact or *Terry* stop.

VanderKooi's testimony with respect to other times he has taken pictures, prints, or both further bolsters the conclusion that the totality of the circumstances are considered as part of the Field Interrogation P&P Custom. In each case VanderKooi summarized,[10] there were specific, articulable facts that not only supported the initial stop, but also facts that justified taking a picture, print, or both either for future identification, to compare the subject's appearance to known, at-large suspects of crime, or to preserve evidence.

Assuming *arguendo* taking a picture and print is a Fourth Amendment search, whether any of these particular applications of the Field Interrogation P&P Custom would survive constitutional scrutiny is beside the point. What matters is that in each case, VanderKooi gave consideration to the totality of the circumstances before he made his decisions to take

[10] Discussed in detail at pp 3–4, *supra*.

or authorize a picture and print. At the very least, no reasonable jury could conclude on the basis of VanderKooi's unrebutted testimony that he made the decisions to take or authorize a picture and print without any consideration of the facts and circumstances of the case, as did the defendants in *O'Brien*, *Gregory*, and *Kostrzewa*.

The facts of both instant cases also demonstrate the consideration given to the facts and circumstances of the incident before a picture and print is taken. VanderKooi testified that his reasonable suspicion Harrison was committing a crime when VanderKooi observed him transfer a large object to Aguilar had never been dispelled, even up to the time of his deposition, because the object—supposedly related to a "school project"—was never recovered. (VanderKooi Dep, J Appx, pp 112a–113a, 115a.) Harrison did not have identification, so VanderKooi requested a picture of him be taken to preserve evidence of his identity and appearance in case an item matching the description of the one he saw was later reported stolen. (*Id.* at 112a.) Even assuming these facts did not legally justify taking Harrison's picture (VanderKooi did not ask his subordinate officer to take a print, even though one was taken), no reasonable jury could conclude that VanderKooi made the decision to take a photograph of Harrison without consideration of the totality of the facts and circumstances.

A witness identified Johnson as a suspicious person whom he had seen peering into car windows in a parking lot that was the site of a large number of vehicle break-ins. (Bargas Dep, J Appx, pp 132a–133a.) Johnson had no identification on his person, Bargas disbelieved his statement of identity (including his claim to be a minor, because of his tattoos), and reasonably suspected Johnson of being involved in the vehicle break-ins based on the witness's description of Johnson's behavior in the parking lot. (*Id.* at 132a–134a.) Bargas

took his picture and prints to record his identity and to confirm or dispel his reasonable suspicion Johnson was involved in the vehicle break-ins. He would achieve this by comparing Johnson's prints with any latent prints from the earlier break-ins, or latent prints from the vehicles Johnson had been observed peering into. (*Id*. at 133a–134a, 136a–137a.) Again, even assuming these facts did not legally justify taking Johnson's picture and print, no reasonable jury could conclude that Bargas made the decision to take a photograph and fingerprints of Johnson without consideration of the totality of the facts and circumstances.

The record evidence does not show that the Field Interrogation P&P Custom authorizes officers to act without consideration of the totality of the circumstances. To the contrary, all evidence in the record demonstrates that the Custom is applied *only* when an officer has considered the totality of the facts and circumstances of the case. Therefore, the Field Interrogation P&P Custom is not a facially unconstitutional policy of the type described in *O'Brien*, *Gregory*, or *Kostrzewa*.

E. Assuming Appellants' constitutional rights were violated, the picture and print custom was not the moving force behind the violations.

Appellants urge this Court to hold that the City is responsible for their alleged constitutional injuries under "traditional tort concepts of causation" on the theory that because the "City specifically authorized the conduct that Plaintiffs allege is unconstitutional: conducting P&Ps during *Terry* stops" it was reasonably foreseeable that constitutional injuries would occur. (AT Supp Brf, p 25.) This argument is without merit.

"As our § 1983 municipal liability jurisprudence illustrates … it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality." *Bryan*

Co, 520 US at 404. In order to be the "moving force" behind a constitutional injury, the custom in question must either be facially unconstitutional or adopted with deliberate indifference[11] to the constitutional rights of those who will come into contact with municipal employees applying the custom. *Id*. at 404–407; *Gregory*, 444 F3d at 752.

In either case, the proofs must evince a conscious or deliberate choice on the part of the municipality to pursue a policy that violates, or is substantially certain to violate, its citizens' constitutional rights. *Tuttle*, 471 US at 823; *Pembaur*, 475 US at 484. For the reasons stated in Sections III(B) and III(D), it is legally impossible for the City to have made a deliberate choice to violate Appellants' rights in these cases because the Field Interrogation P&P Custom neither violates a person's constitutional rights on every application nor fails to take into account the totality of the circumstances when it is applied.

Moreover, if the only thing required for a plaintiff to succeed on a § 1983 municipal liability claim was to identify a municipal policy or custom, allege a constitutional injury, and then argue that the injury was a "reasonably foreseeable" result of adopting the policy or custom—without more—then "the test set out in *Monell* [would] become a dead letter." *Tuttle*, 471 US at 823. To hold the City liable for the alleged constitutional injuries that occurred in this case would contravene the clear teaching of the United States Supreme Court that there must exist proof of a deliberate decision on the part of the municipality to follow an unconstitutional course of action before liability will attach.

Evidence that a causally distant municipal decision "caused" the injury will not suffice:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any ... harm inflicted by a municipal official; for example, [a police officer] would never have killed Tuttle if Oklahoma

[11] Deliberate indifference is a claim that Appellants have not raised. Nonetheless application of this principal is addressed in Section IV, *infra*.

> City did not have a "policy" of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." [*Canton*, 489 US at 389 n 9, quoting *Tuttle*, 471 US at 823.]

Of course in the grand scheme of things it was "reasonably foreseeable" in *Tuttle* that establishing a police force would eventually lead to a police officer using excessive deadly force, but the policy of establishing a police force was still too attenuated to be the "moving force" behind Tuttle's death. Therefore reasonable foreseeability under traditional tort concepts of causation is insufficient to prove that a custom was the "moving force" behind an injury so as to establish § 1983 municipal liability.

Even assuming the Field Interrogation P&P Custom *does* occasionally violate someone's constitutional rights because, for example, there is some defect in an officer's reasonable suspicion determination, there is no § 1983 municipal liability where "an otherwise sound program has occasional been negligently administered." *Canton*, 489 US at 391. Any alleged violations of Appellants' constitutional rights, therefore, were not the result of a policy or custom instituted or executed by the City under the theory of § 1983 municipal liability propounded by Plaintiffs. The Court should therefore deny the application for leave to appeal.

IV. The picture and print custom was not adopted with deliberate indifference to the constitutional rights of the citizens of the City of Grand Rapids.

Reading Appellants' briefs in this case, it frequently seems as though their claims would have fit more neatly under a failure to train or supervise theory of § 1983 municipal liability. After all, if Appellants can concede that, "theoretically … not *every* P&P done during a

Terry stop is unconstitutional" (AT Supp Brf, p 25 (emphasis in original)), and if, as argued above, the Field Interrogation P&P Custom takes into account the totality of the circumstances and thus is not facially unconstitutional, then the only real avenue for liability would be that the City failed to train its officers to know when taking a picture and print was legal and when it was not, or that the City tolerated or acquiesced to a custom of illegal pictures and prints.

However, at no point in these proceedings—neither in the trial court, nor in the Court of Appeals, nor in this Court—have Appellants advance a claim based on an "inaction" theory of § 1983 municipal liability. Even if this theory had been properly advanced in the trial court, Appellants would have waived it by not raising a point of error before the Court of Appeals. *Walters*, 481 Mich at 387. Further, Appellants have failed to advance such a theory before this Court, and the Court cannot make their arguments for them. *Mudge*, 458 Mich at 105.

Moreover, even if this Court concludes that some reason exists to remand the case for further consideration, the principles of res judicata preclude consideration of issues on remand that could have been, but were not, raised to the appellate courts. *Vanderwall v Midkiff*, 186 Mich App 191, 201; 436 NW2d 219 (1990), quoting *Peters v Aetna Life Ins Co*, 282 Mich 426, 432; 276 NW 504 (1937). Therefore, in any subsequent proceedings, Appellants will be barred from advancing a failure to train or supervise claim, or a tolerance or acquiescence claim.

A failure to train claim "requires a showing of prior instances of unconstitutional conduct demonstrating that the municipality had ignored a history of abuse and was clearly on

notice that the training in this particular area was deficient and likely to cause injury." *Burgess v Fischer*, 735 F3d 462, 478 (CA 6, 2013) (internal quotations omitted). "Similarly, a custom-of-tolerance claim requires a showing that there was a pattern of inadequately investigating similar claims." *Id.* (internal citations omitted). The record is devoid of any evidence of either pattern.

Nevertheless, even though as argued above—and as arguably conceded by Appellants in their briefs—the Field Interrogation P&P Custom is not facially unconstitutional, a plaintiff may still "establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights" if he can prove that "the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Bryan Co*, 520 US at 407; *see also York v Detroit*, 438 Mich 744, 756; 475 NW2d 346 (1991); *Jackson v Detroit*, 449 Mich 420, 434; 537 NW2d 151 (1995). "A showing of simple or even heightened negligence will not suffice." *Bryan Co*, 520 US at 407.

"[W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle*, 471 US at 824. Therefore, there is no § 1983 municipal liability where "an otherwise sound program has occasionally been negligently administered." *Canton*, 489 US at 391.

A. A municipality is liable for constitutional injuries that are caused by a custom it has adopted by deliberately choosing to pursue a course of action from among various alternatives.

"As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns[.]" *Bryan Co*, 520 US at 415.

"Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." *Canton*, 489 US at 389, citing *Pembaur*, 475 US at 483; *Tuttle*, 471 US at 823. "City policymakers" do make a deliberate choice from among alternatives to follow a course of action, when that "course of action" is some remote, but "reasonably foreseeable," outcome, as Appellants would have this Court believe.

Rather, in order for a city to be responsible for constitutional violations stemming from a deliberate choice, the United States Supreme Court requires "substantial certainty" that a policy or custom will lead to constitutional violations:

> Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, only then can it be said that the municipality has made a deliberate choice to follow a course of action … from among various alternatives. [*Canton*, 489 US at 396 (internal quotations and citations omitted).]

The record is devoid of "facts available to city policymakers" over the past 30 years that would have put them on actual or constructive notice that the Field Interrogation P&P Custom was substantially certain to violate the constitutional rights of the City's citizens. The

City is not liable, therefore, for any alleged constitutional violations that resulted from adopting the facially constitutional Field Interrogation P&P Custom.

B. A municipality is only liable for constitutional injuries caused by application of a facially constitutional custom when it has actual or constructive notice that the custom is substantially certain to violate its citizens' constitutional rights.

As discussed above, a facially constitutional custom can still give rise to § 1983 municipal liability if the plaintiff can prove that the municipality adopted the custom with "deliberate indifference" to the custom's known, or obvious, consequences: namely the violation of citizens' constitutional rights. *Bryan Co*, 520 US at 407. "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id*. at 410; *York*, 438 Mich at 757 ("Deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a known danger. Thus, it is clear that mere negligence cannot constitute a municipal policy of deliberate indifference.") Thus, in order to be deliberately indifferent to the constitutional rights of its citizens, a city must have actual or constructive knowledge that the course of action it adopts is *substantially certain* to violate those rights. *Canton*, 489 US at 396; *Jackson*, 449 Mich at 433). At no point prior to the incidents giving rise to this litigation could the City have been substantially certain the Field Interrogation P&P Custom would cause the constitutional injuries Appellants allege because the constitutional rights Appellants claim the City violated were not and are not clearly established.

C. The City cannot be deliberately indifferent to constitutional rights that are not clearly established.

As discussed in Section II above and in the City's answer opposing leave to appeal, (pp 27–30), neither this Court nor the United States Supreme Court has recognized a privacy interest in one's face (which is constantly exposed to the public) or in one's fingerprints. Appellants also concede that the question of whether fingerprinting is a search is not clearly established, stating that as to this issue "in [a] limited respect" they "agree with the Court of Appeals that whether fingerprinting is a Fourth Amendment search has not been 'definitively' decided." (App for Leave, p 27.) How can a municipality be deliberately indifferent to a constitutional right that is not clearly established?

The answer is that it cannot. "A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a *particular constitutional … right* will follow the decision." *Bryan Co*, 520 US at 411. Therefore "a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established." *Arrington-Bey v Bedford Hts, Ohio*, 858 F3d 988, 994 (CA 6, 2017) (internal quotation omitted). Federal courts of appeal in other circuits have come to similar conclusions. *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F3d 87, 94 n 10 (CA 1, 1994); *Young v Co of Fulton*, 160 F3d 899, 903–904 (CA 2, 1998); *Townes v City of New York*, 176 F3d 138, 143–144 (CA 2, 1999); *Robles v Fort Wayne*, 113 F3d 732, 735 (CA 7, 1997); *Szabla v Brooklyn Park*, 486 F3d 385, 393 (CA 8, 2007) (en banc); *Young v Augusta*, 59 F3d 1160, 1172 (CA 11, 1995).

This is not to say a municipality is entitled to qualified immunity for constitutional violations that result from its customs or policies: it is not. *See Owen v Independence, Mo*, 445 US 622, 635; 100 S Ct 1398; 63 L Ed 2d 673 (1980). When a constitutional violation stems from

a direct municipal action or execution of a facially unconstitutional policy, "the violated right need not be clearly established because fault and causation obviously belong to the city." *Arrington-Bey*, 858 F3d at 994–995. When, however, the theory of § 1983 municipal liability is that the city adopted a facially constitutional policy with deliberate indifference, "the violated right … must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear." *Id*. at 995.

Because the parties and the courts below agree that a reasonable expectation of privacy in one's facial features and fingerprints under the Fourth Amendment is not a clearly established constitutional right, it is legally impossible for the City to have adopted the Field Interrogation P&P Custom with deliberate indifference to such a right. Therefore no custom or policy of the City was the moving force behind Appellants' constitutional injuries under any type of deliberate indifference theory of § 1983 municipal liability.

V. This Court should deny the application for leave because the Court of Appeals' analysis in these cases does not create a loophole for municipalities to adopt unconstitutional policies.

The language Appellants seem to find most offensive in the opinion below is "the documentation relied upon by plaintiff does not indicate that the city has a policy of *requiring* P&Ps during field interrogations and stops." *Johnson v VanderKooi*, 319 Mich App 589, 625; 903 NW2d 843 (2017) (J Appx, p 367a; *see also* Harrison Court of Appeals Decision, J Appx, p 346a) (emphasis added). Appellants argue that this sentence creates a loophole for municipalities to "avoid liability by explicitly authorizing but not requiring improper conduct by its officers, and thus would provide an unjustified loophole for municipalities to escape liability for constitutional injuries that they clearly caused." (AT Supp Brf, p 23.)

Appellants offer a hypothetical scenario: a city that "has a policy that allows but does not require officers to break down doors without knocking when executing search warrants." (*Id*. at 24.) Appellants note that some officers will break down doors without knocking, while others will not. (*Id.*, at 24–25.) Appellants further assert that some of the "no-knock door-breaking entries will be legal and some will not, depending on how exigent the circumstances are." (*Id.* at 25.) Appellants conclude, "when an unconstitutional door-breaking entry occurs, it is the city's policy authorizing such unconstitutional action that is the moving force behind the violation, not some rogue officer's decision to conduct the entry in that manner." (*Id.*)

Appellants' scenario is on all fours with the Sixth Circuit's analysis in *O'Brien*, *Gregory*, and *Kostrzewa*. The conclusion they draw from the hypothetical scenario—that the Field Interrogation P&P Custom is unconstitutional for the same reason—is not. What made the policies in *O'Brien*, *Gregory*, and *Kostrzewa* unconstitutional was the failure to take into account the totality of the circumstances, such that the customs failed to differentiate between constitutional and unconstitutional applications. Appellants' hypothetical policy also suffers from this fatal flaw.

But under the Court of Appeal's analysis in these cases, such a hypothetical policy would not pass constitutional muster. Appellants ignore the remainder of the analysis of the court's decision, wherein it discusses the specific facts and circumstances Bargas and VanderKooi considered when deciding to take pictures and prints of Appellants. *Johnson*, 319 Mich App at 627 (J Appx, p 367a–368a; *see also* Harrison Court of Appeals Decision, J Appx, p 346a). Further, the Field Interrogation P&P Custom *does* taken into account the facts and circumstances of each case.

Appellants seem to think that the Court of Appeals' decision invites municipalities to adopt facially unconstitutional policies and then avoid § 1983 municipal liability by giving their employees "discretion" to apply the policy in any given situation. But municipal employees are not automatons who lack discretion in applying municipal policies and customs. As an example, state law governmental immunity for intentional torts, under MCL 691.1407 and the test set forth in *Odom v Wayne Co*, 482 Mich 459; 760 NW2d 217 (2008), recognizes that governmental employees frequently engage in discretionary acts, even when their conduct is governed by a municipal policy or custom.

Under *Odom* a governmental employee must both be engaged in a discretionary—as opposed to ministerial—act, acting in good faith, and acting within the scope of his or her employment in order to be immune from intentional tort liability. *Id*. at 480, citing *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich 567, 633–634; 363 NW2d 641 (1984), superseded in part by MCL 691.1407. However, *Ross* also held that an employee acts within the scope of his or her employment when acting according to "established administrative guidelines, regulations and informal policy." *Ross*, 420 Mich at 633, citing Littlejohn & DeMars, *Governmental Immunity After Parker and Perry: The King Can Do Some Wrong,* 1982 Det C L Rev 1, 25–27. A discretionary act is one that requires "personal deliberation, decision and judgment," and implies that the governmental employee has "the right to be wrong." *Odom* 482 Mich at 476 (internal citations omitted).

Thus Michigan law implicitly contemplates that governmental employees executing their duties according to internal policies and customs retain their discretion in how the conduct those duties. The officers in *Garner*, *O'Brien*, *Gregory*, and *Kostrzewa* all used their per-

sonal deliberation and judgment to act according to the unconstitutional policies their municipal employers adopted. The fact that they were engaged in discretionary, rather than ministerial, acts made no difference to the courts' analyses. Thus Appellants' fears about municipalities exploiting a loophole created by the Court of Appeals is misplaced.

Appellants' contention that the Court of Appeals created a loophole for § 1983 municipal liability is also undermined by the court's explicit conclusion that Appellants failed to raise a genuine issue of fact regarding whether their pictures and prints were taken as a result of a custom because "the most that can be gleaned from the evidence presented to the trial court was that the P&P procedure was available for use by GRPD officers and could, *depending on particularized circumstances*, be used during the field interrogation of a person who was never arrested or charged with a crime." *Johnson*, 319 Mich App at 628 (J Appx, p 368a; *see also* Harrison Court of Appeals Decision, J Appx, p 346a) (emphasis added). Thus the Court of Appeals recognized the principle set out in *O'Brien*, *Gregory*, and *Kostrzewa*: a custom is not the moving force behind a constitutional injury if it considers the totality of the circumstances to differentiate between constitutional and unconstitutional applications.

Because the Court of Appeals' conclusion that no custom of the City caused the alleged constitutional injuries Appellants suffered was premised on the fact that the custom was applied with respect to the particular facts and circumstances of each case, the opinion does not create a loophole in § 1983 municipal liability, as Appellants assert. Because the Field Interrogation P&P Custom did not cause any alleged constitutional injury to Appellants and because the Court of Appeals did not create an incorrect legal standard that will open a loophole for municipalities to avoid liability for their unconstitutional policies, this Court should deny leave to appeal.

CONCLUSION

The United States Supreme Court in *Monell* went to great lengths to justify, through a thorough examination of the legislative history, imposition of a limited form of liability upon municipalities for constitutional torts committed by their employees. *See generally Monell*, 436 US at 664–689. Congress evidently had grave concerns whether it had the constitutional authority to impose such liability at all. *Id*. Therefore in the years since *Monell* was decided, both the United States Supreme Court and lower federal and State courts have been careful to limit the scope of § 1983 municipal liability and guard carefully against laying down rules of law that would impose *respondeat superior* liability on municipalities for the constitutional torts of their employees. Given this legal background, Appellants have undertaken the herculean task of attempting to connect the alleged violation of a constitutional right that may not even exist with a "custom or policy" that has never been committed to paper.

What has been proved in the record about the contours of the challenged custom, however, shows that it falls squarely *outside* the narrow band of municipal actions that give rise to § 1983 municipal liability. Indeed, the challenged custom meets every test of constitutionality that this Court and the United States Supreme Court has devised. Therefore, to answer the question posed by this Court in its January 12, 2018 Order, any alleged violation of Appellants' constitutional rights was *not* the result of a policy or custom instituted or executed by the City. Defendants-Appellees respectfully request this Court deny the Application for Leave to Appeal.

Dated: March 9, 2018

By: */s/ Elliot J. Gruszka*
ELLIOT J. GRUSZKA (P77117)
Assistant City Attorney
Counsel of Record for Defendants-Appellees

Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX
egruszka@grcity.us